

ADVISORY OPINION 1999-004

Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered. KRS 121.135(4).

March 18, 1999

Hon. William H. May III, Counsel
Patton-Henry for Kentucky Committee
P.O. Box 1371
Frankfort, Kentucky 40602

Dear Mr. May:

This is in response to your letter dated February 15, 1999 requesting an advisory opinion regarding volunteer services and prorating employee and professional services between the Patton-Henry for Kentucky Committee (“Committee”) and the Kentucky Democratic Party (“KDP”). Your questions address sharing employee and professional services.

(A) EMPLOYEES OF KDP PROVIDING TIME AND SERVICE ON BEHALF OF THE COMMITTEE

Your letter explains that the Committee’s headquarters share space and equipment with KDP at the KDP-owned headquarters. This arrangement is reflected in a lease executed between the parties, but not provided to the Registry. Your first series of questions addresses the activities of full-time KDP employees and their ability to assist the Committee without resulting in a contribution from KDP to the Committee.

KRS 121A.010(11)(b)(1) exempts from the definition of contribution “[s]ervices provided **without compensation** by individuals volunteering a portion or all of their time on behalf of a slate of candidates, committee, or contributing organization.” (Emphasis added.) 32 KAR 2:170 § 1(5) further identifies the conditions under which services provided by an employee (other than a campaign employee) may be considered voluntary:

(5) No compensation shall be considered paid to any employee under the following conditions:

- (a) If an employee is paid on an hourly or salaried basis and is expected to work a particular number of hours per period, no contribution results if the employee engages in activity for the benefit of a candidate, slate of candidates, committee, or contributing organization during what would otherwise be a regular work period, provided that the taken or released time is made up or completed by the employee within a reasonable time;
- (b) No contribution results where an employee engages in activity for the benefit of a candidate, slate of candidates, committee, or contributing organization during what would otherwise be normal working hours if the employee is paid on a commission or piecework basis, or is paid only for work actually performed and the employee's time is considered his own to use as he sees fit; or
- (c) No contribution results where the time used by the employee to engage in activity for the benefit of a candidate, slate of candidates, committee, or contributing organization is bona fide, although compensable, vacation or other earned leave time.

1. If the Committee intends to send out a bulk mailing and a full time Employee possesses a particular skill, such as the ability to execute the "mail merge" function for the computer program from which the mailing will be sent, would that Employee be allowed to volunteer to execute this function on behalf of the Committee if the Employee did so on his or her own time? Would the value of this time or service constitute a "contribution" to the Committee if it exceeds \$100? Even if it did not exceed \$100?

A KDP employee may volunteer his or her services, including skilled services such as executing a computer program function, regardless of value, to the Committee, provided the time and services are donated under circumstances that do not result in compensation. See 32 KAR 2:170 § 1(5)(a)-(c). Volunteer services as described above would not result in a contribution under KRS 121A.010(11).

2. If another Employee wishes to volunteer time to assist stuffing the envelopes for the mailing described above, are they permitted to do so? Would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

See response to question 1. Regardless of whether a volunteer is donating skilled or clerical services, if the time is donated without compensation, no contribution results.

3. If an Employee makes himself/herself available to the Committee on an "as needed" basis, and performs tasks for the Committee during hours which that Employee would normally be working for the Party [KDP], would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

A KDP employee who makes himself or herself available to the Committee on an "as needed" basis, may still be considered a volunteer if "the taken or released time is made up or completed by the employee within a reasonable time," 32 KAR 2:170 § 1(5)(a), or if the employee uses his or her own time, including "bona fide . . . vacation or other earned leave time." 32 KAR 2:170 § 1(5)(c). Under the foregoing circumstances, a contribution would not result.

However, if during regular working hours KDP provides employees to the Committee, and the Committee does not reimburse KDP for the compensable time of the employees, an in-kind contribution would result when the cumulative value of all KDP time, services and any other thing of value by KDP to the Committee exceeds one hundred dollars (\$100).

4. If a printer owned by the Party [KDP] is being used at fair market value by the Committee and this printer is located in the common area of the building next to the receptionist's station, is that receptionist (an Employee of the Party [KDP]), or another Employee working at that station, permitted to consider his or her services to be volunteer time pursuant to KRS 121.015(7)(a) if the services involve feeding Committee paper through and removing printed Committee materials from that printer? If this can be done without the Employee physically leaving their station or detracting from the value of their services to the Party [KDP] would the Employee be unable to be compensated by the Party [KDP] for time spent feeding paper into or removing it from the printer for the Committee? Would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

The value of employee services that are shared by the Committee and KDP, such as the services of a receptionist, mailroom or print shop should be prorated between the Committee and KDP. The fair market value of these services may be determined by the charge for these services if purchased through an outside vendor. Various companies provide answering, fax receipt and copy services, which include the value of the staff performing such services. However, incidental courtesy between KDP employees and Committee volunteers, which may not be attributed an ascertainable value (i.e. no compensable time), would not result in a contribution under KRS 121A.010(11)(a) (substantially similar in content to KRS 121.015(7)(a), but specifically applicable to gubernatorial slates).

5. If a supporter of the Committee attempts to contact the Committee but is unaware of the Committee's direct phone line or separate post office box, and if this supporter either places a call to or corresponds with Party [KDP] headquarters in an attempt to reach Committee headquarters and if this call is initially received by a Party [KDP] Employee, or if this correspondence is initially opened and reviewed for forwarding by a Party [KDP] Employee, would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

As stated above, the fair market value of shared reception or mail and fax receipt services should be prorated between the Committee and KDP. However, the function of KDP as an informational source for KDP members and the public, such as giving a slate's or committee's telephone, facsimile or post office box number, would not constitute a contribution to the slate or committee.

6. If an Employee of the Party [KDP] as a supporter of the Committee, wishes to attend a Committee event held in another town and an employee of the Committee will be attending the same event, are they allowed to travel to this event together? If the Employee of the Party [KDP] drives the employee of the Committee to this Committee event, would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

Shared travel expenses that are compensable (i.e. mileage on KDP-owned vehicles or personal vehicles used to commute out of the immediate area), if not prorated between the Committee and KDP or otherwise reimbursed by the Committee, would result in an in-kind contribution when the cumulative value of all expenses paid for by KDP and any other thing of value by KDP to the Committee exceeds one hundred dollars (\$100).

(B) PROFESSIONAL FUNDRAISER SERVICES

The second set of questions concern the circumstances under which a "professional fund raiser [sic]" hired full time by the Committee may render services to KDP. A "fundraiser" is defined by KRS 121.015 (11) as "an individual who directly solicits and secures contributions on behalf of a candidate or slate of candidates for a statewide-elected state office or an office in a jurisdiction with a population in excess of two hundred thousand (200,000) residents." For purposes of this advisory opinion, the term "Fundraiser" refers to an employee or service provider to the Committee or KDP rather than a statutory "fundraiser," which would trigger other reporting requirements. See KRS 121.170(2)-(3); KRS 121.180(3)-(5); KRS 121A.020(5); KREF AO 1993-015.

There is nothing in KRS Chapters 121 or 121A that would prevent a campaign fundraiser or any other professional service provider from working for more than one campaign or committee.

1. If a Fundraiser is initially hired by the Committee, is this Fundraiser also allowed to work in an official capacity for the Party [KDP] if his/her compensation is prorated between the Committee and Party [KDP] for the value of time and services actually spent working for each entity?

Yes, provided the Committee pays the Fundraiser only for the work performed on its behalf.

2. If the answer above is no, is this Fundraiser, as a full-time employee of the Committee, allowed to volunteer their own time and services to the Party [KDP]?

See above response.

3. If a full-time Fundraiser is hired by the Party [KDP] is this Fundraiser allowed to volunteer his or her time and services to the Committee? Would the value of this time or service constitute a "contribution" to the Committee if it exceeded \$100? Even if it did not exceed \$100?

As stated under subsection A, KRS 121A.010(11)(b)(1) exempts from the definition of contribution "[s]ervices provided **without compensation** by individuals volunteering a portion or all of their time on behalf of a slate of candidates, committee, or contributing organization." (Emphasis added.) An employee may volunteer his or her services under circumstances that do not result in compensable time as described under 32 KAR 2:170 § 1(5). Provided a full-time Fundraiser of KDP provides his or her services to the Committee under circumstances that do not result in time compensated by KDP or expenses paid for by KDP, no contribution would result.

4. If the Committee hires a Fundraiser for the sole purpose of raising funds for the primary and this Fundraiser's employment with the Committee ceases after meeting the Committee's fundraising goals for the primary, after which time the Fundraiser is hired by the Party [KDP] and serves as a Fundraiser for the Party [KDP] until after the primary when he or she is once again hired by the Committee to head up the fundraising efforts for the general election and serves in this capacity until the fundraising requirements of the Committee have been met, at which time the Fundraiser returns to the Party [KDP] as a Full time Employee, is such a scenario permissible so long as during periods of employment by the Committee the Fundraiser works only for the Committee and during periods of employment by the Party [KDP] the Fundraiser works only for the Party [KDP]?

This course of action is permissible, provided the Committee and KDP are able to accurately account for the services provided to each entity and compensate the Fundraiser appropriately.

The foregoing advisory opinion is based upon the specific transactions or activities outlined in your letter.

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In response to your request for confirmation of information obtained during an informal conference with Registry staff, the following clarifying information is provided.

Regarding the meaning of "coordination" under KRS 121A.010(13), Kentucky campaign finance statutes do not define coordination. Therefore, the Registry would interpret the word in accordance with the rules of statutory construction as set forth in KRS 446.080(4). The Registry would consider the case of Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 614, 116 S. Ct. 2309 (1996), wherein the United States Supreme Court held unconstitutional federal regulations creating a presumption of coordination between a political party and its future nominee. In light of this Supreme Court decision, a party executive committee is not prohibited from making an independent expenditure under KRS 121A.010(13).

Regarding paragraph seven (7) of subsection C of your letter, the Registry does not regulate issue advertising. The case of Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), precluded the Federal Election Commission from asserting jurisdiction over expenditures for advertising which does not advocate the election or defeat of a clearly identified candidate or candidates. In Buckley, the United States Supreme Court recognized that "the distinction between discussions of issues and candidates (on the one hand) and advocacy of election or defeat of candidates (on the other) may often dissolve in practical application." Buckley, 424 U.S. at 42, quoted in Federal Election Commission v. Christian Action Network, 110 F.3d 1049, 1051 (1997).

The Court adopted the bright-line limitation that it did in Buckley in order to protect our cherished right to political speech free from government censorship. ...[T]he Court concluded, plain and simple, that absent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of reprisal would be intolerably chilled.

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Christian Action Network, 110 F.3d at 1051. The Buckley decision applied strict scrutiny for restricting political speech, and under Buckley, the only compelling reason for governmental restriction of political speech is corruption or the appearance of corruption. Id. at 26. The United States Supreme Court has held that corruption or the appearance of corruption is not present when addressing issue advocacy. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 102 S. Ct. 434, 70 L.Ed.2d 492 (1981) (holding that the appearance of corruption is not present in speech addressing a public issue referendum).

Regarding paragraph eight (8) of subsection C of your letter, the Registry issued KREF Advisory Opinion 1998-017 in direct response to this issue.

Regarding paragraph nine (9) of subsection C of your letter, in its last regular meeting on January 21, 1999, the Registry agreed, without motion or discussion, to continue the application of its opinion in KREF v. Jim Wayne, Case No. 96-205 (1997), regarding the definition of the phrase “should have known” within the definition of “knowingly,” under KRS Chapters 121 and 121A. See Transcript 1-21-99 at 211-213.

If you have any additional questions, please do not hesitate to contact the Registry staff.

Sincerely,

Rosemary F. Center

RFC/jh